NO. 83-595

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

KENNETH R. SNOW, et al.,
Petitioners,

v.

QUINAULT INDIAN NATION, et al.,
Respondents.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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1. Does the Quinault Indian Nation have jurisdiction to tax Indian and non-Indian operated businesses on reservation fee and trust land which do business with the Tribe and its members which intentionally engage in forestry and tourism related businesses thereby benefiting from tribal government programs encouraging and enhancing those businesses?

2. Does the Indian Civil Rights Act prohibit the Quinault Indian Nation from offering a tax credit to any businesses employing Indians on the Reservation?

3. May Petitioners raise Fifth Amendment delegation of federal power questions that do not present substantial federal questions?

4. Should the Court consider a challenge to taxes which have never been

assessed by the Tribe and never paid by Petitioners?

5. Should the court consider challenges to tribal taxes that were never presented to available tribal administrative or judicial fora?

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No. 83-595

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SUPREME COURT OF THE UNITED STATES

KENNETH R. SNOW, ET AL.,

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v.

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RESPONDENTS

Respondents' Brief in Opposition

Opinion Below

The opinion of the Court of Appeals is reported at 709 F.2d 1319.

I

Statement of the Case

A. Proceedings Below

Peitioners commenced an action in District Court for declaratory and injunctive relief and "extensive damages"

before the Quinault Nation's business tax became effective on August 1, 1977. CR1; CR15D.[1] More than three years later, the case was submitted to the District Court on cross-motions for summary judgment. The District Court rejected Petitioners' claim that Indian Tribes have no jurisdiction to tax and that those Petitioners who do business on fee land are necessarily immune from

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[1] Among the parties not mentioned in Petitioners' Br., at i, are the following Plaintiffs-Appellants below: Ralph I. Thomas, See App. A; June Hopkins; Joseph L. Howard; Juanita Olson, d/b/a Amanda Park Tavern; C. Lawrence Chapman; Ernie Holmberg, d/b/a Holmberg Cedar Products, Inc.; William J. and Irene E. O'Connor Enterprises; Mary E. Highland, d/b/a The Cedars; Jean Brown, Secretary for Rain Forest Timber Products, Inc.; Albena Anderson, d/b/a Pacific Logging; Melvin Camas, d/b/a Camas Tire Shop; Leo Warren; d/b/a Wholesalers, Unltd.; William Richter, d/b/a Bill's Fixit Shop; Darrell Spoon, d/b/a Spoon's Automotive Parts, Inc.; Marjorie Dahinden; Dean S. Hopkins. CR99.

tribal taxes. Further, based on decisions of this Court, and the affidavits of the parties, the District Court determined that there was no genuine dispute as to any material issue. Based on substantial services provided by the Quinault Nation benefiting Petitioners' Reservation businesses, and there being no genuine dispute as to any material issue, the District Court granted summary judgment to Respondents. CR101, Pet. A15-24. Petitioners then moved for reconsideration, CR102. During the nearly three months when this motion was pending, CR108, Petitioners did not submit any additional affidavits to establish the existence of a genuine dispute, nor did they represent that they needed more time to gather additional evidence. Rule 56(f). The motion for reconsideration was then denied.

After briefing and argument in the Court of Appeals, submission was withdrawn pending disposition of Cardin v. DeLaCruz, 671 F.2d 363 (9th Cir.), cert. denied, 103 S.Ct. 293 (1981) (upholding enforcement of Quinault building, safety and health codes). Upon reinstatement of the case, and applying the decisions of this Court, the Court of Appeals affirmed.

II

Statement of the Facts

A. The Quinault Reservation

The Quinault Reservation is isolated and heavily forested, located on the Olympic Peninsula's Coast. Reserved pursuant to the Treaty, 12 Stat. 971 (1855), from the aboriginal territory of the Quinault Indians, the Reservation's 200,000 acres includes Lake Quinault, the Quinault River, and other waters historically used and

regulated for their fishing resources. United States v. Mitchell, 103 S.Ct. 2961, 2963-2964 (1983); Hoh Tribe v. Washington, 522 F.Supp. 683 (W.D. Wash. 1981); Mason v. Sams, 5 F.2d 255 (W.D. Wash. 1925). The Quinault Indian Nation is organized under a written consitution adopted in 1922. CR15, App. A.

Approximately two-thirds of the Reservation population is Indian. Appellees' Ct. Appeals Br., App. C. Many, possibly most, of the non-Indians on the Reservation are married to Quinaults, work for the Tribe or the United States Indian Service or for the entities which do businesses with the Tribe or its members. Petitioners concede they do business with tribal members.

Pet. at 6.[2]/

B. Facts and Services Supporting Tribal Tax

Petitioners attempt to portray themselves as an economically insulated enclave of non-Indians residing and doing business in Amanda Park with no significant contact with the Tribe or its members. Petitioners emphatically ignore their own Complaint which identifies George Bertrand, an enrolled Quinault, as one of the businessmen residing in Amanda Park challenging the tribal tax. Para. 3.1, CR1. Plaintiff-Petitioner Erickson, by contrast, is a Seattle attorney who challenges the tax on

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2/ Petitioners attempt to qualify this jurisdictionally significant fact by stating their business with Indians is only "incidental." This attempted qualification, mere ipse dixit from Petitioners' counsel, is not supported by any affidavit as required by FRCP 56. Facts properly proved by Respondents show that Petitioners do substantial business with the Tribe and benefit substantially from services rendered by the Tribe.

attorneys practicing law in the Quinault Tribal Court. He represented Petitioner Rasmussen in a suit in Tribal Court over sewage entering the Quinault River from Rasmussen's Trailer Court, Quinault Indian Nation v. Rasmussen, which resulted in a voluntary settlement. Petitioner Thomas also practices law in Tribal Court. See App. A. The uncontroverted record establishes that Petitioner Snow sells Quinault tribal fishing permits to enhance his business trade. CR 96. Petitioner Sansom likewise sells outboard motors and fishing tackle. CR 30 at 2. The Quinault Nation maintains an account at Snow's store to purchase hardware and other items used by the Tribe at its Lake Quinault-Amanda Park fish hatchery. Tribal fishery vehicles are fueled and serviced at Petitioners' businesses. Students from Amanda Park are regularly hired by the

Tribe to work at the Tribe's Amanda Park-Lake Quinault fish hatchery. The Quinault Nation has helped ensure moreover that a high level of water quality is maintained in Lake Quinault by stopping dumping of raw sewage into the Lake by a major resort and by assisting federal authorities in placement of a sewage system to replace defective septic systems along the lake-shore. Amanda Park is on the shores of Lake Quinault. The Tribe manages Lake Quinault's recreational fishery through its Fish and Game Commission, tribal biologists and other staff, and plants fish in the Lake from its fish hatchery. Tribal enforcement officers also ensure compliance with tribal fishing and boating regulations. Aff. of Mason, CR 96. Thus, the Tribe is involved in comprehensive management, regulation and enhancement of boating, fishing, swimming and water

quality on Lake Quinault, as well as doing business locally and being a local employer. Protection of water quality in Lake Quinault protects the domestic health of local residents and business people and makes the Lake attractive to and safe for tourists. This directly benefits local tourism oriented businesses which would be directly and adversely affected if the Tribe did not permit or did not manage and regulate Lake Quinault to promote and protect tourism and related businesses.

Most of the Reservation's lands are valuable primarily for their timber resources, approximately two-thirds of which are held in trust. CR 64. The Quinault Department of Natural Resources provides various resource protection services in reservation forest lands, both fee and trust. Department staff maintain a forest fire watch, are trained

in forest fire fighting, maintain forest fire equipment, and fight fires on fee and trust land. The Department exercises regulatory control over logging activities that can damage fish streams, timber resources, and the future productivity of forest lands. The Quinault Nation plants fish to replace runs of fish damaged by logging activities. United States v. Washington, 384 F.Supp. 312, 375 (W.D. Wash. 1974). Approximately 800 miles of forest roads are maintained by the Tribe and its members providing access to much of the Reservation's forest interior. The vast majority of economic activitiy within the Reservation consists of logging, salvaging and milling of cedar shakes and shingles. CR 64. Emergency health care and emergency transport services provided by the Tribe and utilized by Indians and non-Indians are especially important to

people injured in dangerous forestry work on the Reservation. CR 44, App. D. Tribal police conduct timber theft patrols throughout the Reservation, the value of which is noted in a letter from ITT Rayioner. CR 66. These patrols benefit owners of fee and trust land and all those engaged in the forest products business by providing visible law enforecement. Tribal officers arrest Indian violators and can detain non-Indians suspected of crimes and turn them over to appropriate federal and state authorities for prosecution. Ortiz Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975); State v. Burrola, 669 P.2d 641 (Ariz. App. 1983); State v. Ryder, 648 P.2d 774 (N.M. 1982). These services directly benefit Petitioners and others who are engaged in the Reservation forest products business, e.g., Ernie Holmberg, d/b/a Holmberg Cedar Products;

Jean Brown of Rain Forest Timber Products, Inc.; Cathy Stajar, Pacific Logging; ITT Rayonier, Inc., CR 55; Mayr Brother Logging Co., CR 77-78.[3] These tribal government services likewise benefit businesses which sell goods and services to entities and persons engaged in forestry enterprises because these tribal programs afford protection and encouragement to the

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[3] Petitioners previously sought to intervene and consolidate this case with ITT Rayonier, Inc. v. Quinault Indian Nation, 163F (W.D. Wash. 1980), CR 48-52. That case also involved a challenge to the Quinault tax by ITT Rayionier which is in the business of harvesting timber from trust and fee land within the Quinault Reservation. Before Petitioners motion came on for consideration that case was settled, CR 55, as a result of which ITT agreed to pay taxes reserving a right to protest future taxes. Still pending before the District Court is the motion to intervene by Mayr Brothers Logging Co. CR 77-78, 87. Mayr Brothers also is involved in harvesting timber from trust land.

forestry commerce which creates their business revenues. See, Anderson v. O'Brien, 524 P.2d 390, 394 (Wash. 1974) (economic multiplier or ripple effect of economic development programs).

Funding for tribal government programs comes from federal contracts, from earnings of tribal owned businesses, and tribal taxation. CR 65. Federal funding is aimed at promoting the economic and political ability of the Tribe to carry out governmental programs affecting the Reservation. Federal funding, which is not permanent by design, is cumbersome, inflexible, and diminishing. Appropriations by the Quinault Nation from earnings of tribal seafood and forestry businesses are limited and deprive those enterprises of capital needed for investment and development. Tribal businesses are also subject to the tribal business tax.

Because federal contracts and tribal businesses do not provide all funding needed to tribal government programs, the Quinault Nation has enacted taxes. Some of these taxes are imposed solely on Indians engaged in harvesting fish and clams pursuant to treaty rights. CR 65 at 2-3. Other taxes apply evenhandedly to Indians and non-Indians, such as the tax in this case.

Detailed affidavits submitted by Respondents establish the foregoing facts. Most of the Petitioners did not file any opposing affidavits. Petitioners Snow, Sansom and Rasmussen submitted conclusory affidavits asserting that they receive police, fire and education services from the state and: "That neither I nor other residents of Amanda Park receive any services from the Quinault Indian Nation. All services

are provided by the State of Washington and the County of Grays Harbor, for which the residents of Grays Harbor are taxed." CR 30-32, 95. Petitioners did not deny that they do business with the Quinault Nation or with individual Indians; that the Quinault Nation encourages and promotes Reservation tourism, especially in the area around Lake Quinault; that the Quinault Nation has protected and improved domestic and recreational water quality on Lake Quinault; that the Quinault Nation stocks fish in Lake Quinault, regulates fishing, swimming and boating on the Lake; that governmental activities of the Quinault Nation protect and promote commerce in forest industries throughout the Reservation; or that Petitioners do business with people who are on the Reservation to harvest timber from trust lands. The two courts below were not persuaded that Petitioners con-

clusory denials met the burden imposed by FRCP 56(e) to controvert by specific facts the evidence set forth in Respondents' affidavits. 4/

Through the tax being challenged the Quinault Indian Nation seeks to raise revenue to support governmental services it provides throughout the Reservation. Major business activities within the Reservation are forestry (which accounts for 90% of all jobs and commerce), fishing and tourism. A minimal tax is

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4/ Rule 56(e) provides in part: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a geniune issue for trial." Moreover, some of the statements made in affidavits by Petitioners Snow, Sansom and Rasmussen were not shown to be made on personal knowledge, as required by rule 56(e). How do they know what services Bertrand, a Quinault Indian, receives from the Tribe or whether Bertrand resides on non-Indian land?

imposed on Reservation business activity in which the Tribe has a significant interest. The annual Quinault Tax is measured by the number of persons employed by the business within the Reservation--generally $25.00 per employee. A tax of $100.00 is imposed on attorneys practicing law in Tribal Court.[5]

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[5] Petitioners Snow, Rasmussen and Sansom employ 8 people, none of whom are Indians. The maximum annual tax which these three Petitioners might owe collectively is between $200.00 and $250.00. Petitioner Sansom's affidavit attempted to portray his two person gas station business as a conglomerate with separate divisions for soda machine, gas, garage, towing, etc., in order to manufacture a claim that he had been "assessed" $500.00 in taxes. Of course, such a tax on a diversified conglomerate would not be onerous. In fact, however, neither he nor any of the other Petitioners has ever been "assessed" any taxes. CR 44, App.L. (The only exception is Petitioner Thomas, who paid the tax on attorneys practicing law in Tribal Court.) Petitioner Sansom never sought tribal administrative or judicial review of his artificial segmentation of his business. CR 44, App.L In reality, Petitioner Sansom may owe a maximum tax of $50.00 or $100.00.

In order to encourage employment of Indians, a tax credit is available to any business employing Indians which reduces the tax rate by one-half for each Indian employee. Rule 2.40(7)(a), CR 44, App. D. 6/

Petitioners deliberately bypassed available tribal administrative and judicial fora, asserting an immunity to any tribal taxing jurisdiction under any circumstances. CR 44, App. L and CR 15, App. K. According to Petitioners, tribes lack power to tax because such power derives exclusively from "basic tenets of Anglo-Saxon powers of raising revenue."

6/ In 1978, the rate of unemployment of Quinault Indians was 45.1%, which was 5.7 times greater than the Washington state rate and 7.2 times greater than the national rate. CR 44, App. C. Unemployment climbed sharply after 1978, with the effects of the recession being accutely felt in the Reservation forest products industry.

Pet. Ct. App. Br. at 8. 7/

Respondents do not challenge whether Petitioners receive some state services or whether Petitioners pay state taxes. Respondents have not claimed that tribal tax jurisdiction preempts state tax jurisdiction. Respondents do claim that businesses which engage in commerce with Indians or that receive substantial benefits from intentionally engaging in Reservation commerce encouraged and protected by the Quinault Nation are subject to tribal tax jurisdiction. Respondents have not attempted to tax activities with the Reservation which receive no significant benfits from the tribal goverment.

7/ But see, e.g., Huang, Taxation and Government Finance in Sixteenth Century Ming China; van der Sprenkel, Legal Institutions in Manchu China 43-49 (1972).

III

Reasons to Deny the Writ

A. Not a Case of National Significance

Petitioners have never been assessed nor have they ever paid any tribal taxes.[8] Petitioners never sought tribal administrative or judicial review of their claims. The amount of taxes, if any, which the Quinault Nation may seek from the various Petitioners depends on a case-by-case determination that has yet to occur. On this uncertain record, this case is premature for review by this Court and does not raise issues of national importance.

B. Decisions Below Correctly Reject Petitioners' Absolute Immunity Arguments

Tribal government jurisdiction to tax was reaffirmed in Merrion v. Jica-

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[8] The only exception is Petitioner Thomas who paid the tax on attorneys practicing law in the Tribal Court.

rilla Apache Tribe, 455 U.S. 130, 137 (1982), as "an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." This power derives in part from traditional governmental authority to defray the cost of providing services by requiring contributions from those benefiting from those services. Id. at 137-138. See also, Morris v. Hitchcock, 194 U.S. 384 (1904). In Montana v. United States, 450 U.S. 544 (1980), this Court noted that tribes retain civil jurisdiction to tax non-Indians on fee land who engage in commercial and consensual relationships with a Tribe or its members and that a Tribe also has jurisdiction over non-Indians on fee lands whose conduct threatens or has some direct effect on the political integrity, economic security, health or welfare of the Tribe

or its members. See also, Buster v. Wright, 135 Fed. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906).

Applying these and other decisions of this Court, the courts below correctly rejected Petitioners' argument that tribes have no power to tax. The courts below held that Indian tribes retained jurisdiction to tax, consistent with overriding federal interests, as a fundamental attribute of their sovereignty. Washington v. Confederated Colville Tribes, 447 U.S. 134, 152-154 (1980). Since the record establishes that Petitioners do business with the Tribe and its members, and that Petitioners benefit from extensive tribal government programs promoting and enhancing tourism and forestry related businesses on the Quinault Reservation, tribal jurisdiction to tax such businesses was appropriately found by the

District Court. Merrion v. Jicarilla Apache Tribe at 137-138. 9/ That some of the Petitioners are non-Indians, and that some of them do business on fee land does not immunize them from this tribal tax. Buster v. Wright, 135 Fed. at 950-952, discussed in Merrion, 455 U.S. at 143.

Although the fact that Petitioners do business with the Tribe and its members is dispositive, other considerations

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9/ Petitioners realize substantial benefits as a result of tribal programs encouraging and facilitating tourism and forestry. Moveover, the Quinault Tribal Court is available as a forum where Petitioners can resolve legal disputes growing out of their admitted business and other dealings with tribal members and the Tribe itself. Williams v. Lee, 358 U.S. 217 (1959). The availability of the Tribal Court to resolve disputes growing out of those transactions supports a tax. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). This applies with special force to attorneys who earn part of their living by practicing law in Tribal Court. Maxey v. Wright, 54 S.W. 807 (Ind. Terr.), aff'd, 105 Fed. 1003 (8th Cir. 1900); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1147 (8th Cir. 1973).

support the Tribe's tax. Paramount among these is that Petitioners have intentionally engaged in Reservation tourism and forestry businesses that are inextricably tied to the exploitation of the Reservation's trust resources. Comprehensive tribal programs managing, enhancing, and regulating Lake Quinault make swimming, boating, fishing and other recreational pursuits in the Lake Quinault-Amanda Park area safe and attractive. See, New Mexico v. Mescalero Apache Tribe, 103 S.Ct. 2378 (1983). Protecting and enhancing the water quality of Lake Quinault benefits not only tourists, but also Petitioners, their families and employees.[10/] Broad

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[10/] Clean water, like clean air, has been found by Congress to be in the public interest. 33 U.S.C. Section 1251. Nance v. EPA, 645 F.2d 701, 716 (9th Cir.), cert. denied, 454 U.S. 1081 (1981). See Clean Air Act, 42 U.S.C. Sec. 4747(c); Clean Water Act, 33 U.S.C. Sec. 1362(4).

ranging tribal programs regulating forest practices, rehabilitating damage to the fishery caused by logging activities, providing emergency medical services, maintenance of roads providing access to forest lands, providing protection against forest fires and theft of forest products, etc. similarly benefit businesses depending upon the forestry industry for their revenue. The tribal tax is clearly appropriate when directed to businesses like those of Petitioners which avail themselves of the benefits of tribal programs. Likewise for attorneys practicing law in Tribal Court. "The simple but controlling question is whether the [Tribe] has given anything for which it can ask a return." Wisconsin v. J.C. Penny Co., 311 U.S. 435, 444 (1940). The benefit Petitioners receive is the substantial benefit of increased revenue and busi-

ness opportunities. National Meat v. Deukmejian, 562 F.Supp. 357, 361 (E.D. Cal. 1983).11/

The tribal government has significant political, economic and other interests in exacting a fair share of the cost of providing those services "through taxation of non-Indians who benefit from those services." Merrion v. Jicarilla Apache Tribe, 455 U.S. at 140. See, Commonwealth Edison v. Montana, 453 U.S. 609, 616 (1982); Washington v. Confederated Colville Tribes, 477 U.S. at 152. "Under these circumstances there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of govern-

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11/ The economic multiplier or ripple effect of the expenditure of tribal funds in these programs itself creates additional reservation business opportunities. Anderson v. O'Brien, 524 P.2d 390, 394 (Wash. 1974).

ment." Merrion v. Jicarilla Apache Tribe, 455 U.S. at 138.

Given the state of the record in this case--a challenge to a tax before it goes into effect, and where there has been no assessment or payment of taxes--all the decisions below could do is restate, as they did, a generally established principle of law; that is, those reservation businesses which do business with a Tribe or its members or who receive business benefits from tribal programs are subject to tribal taxation. More concrete issues will be presented by some other case where taxes have actually been assessed and collected.12/

12/ The Quinault Tax Statute of Limitations Act establishes a procedure by which taxpayers can pay the tax under protest and then file a complaint in Tribal Court contesting any issue regarding the amount or jurisdiction of the Tribe to impose the tax.

C. Reservation Businesses Dealing With Indians And Benefiting From Tribal Services May Be Taxed Whether On Trust Or Fee Land

Contrary to Petitioners' assertion, the Court of Appeals did not recognize tribal jurisdiction to tax non-Indians simply because they are within the Reservation, nor did the Court of Appeals accept Petitioners' claim that those who are doing business on fee land are necessarily immune from tribal taxation. Petitioners concede that the District Court's opinion, Pet. A15-23, follows the guidelines set by this Court. Pet. at 18 n.7. The opinion of the District Court as well as the record on which it rendered its decision were before the Court of Appeals. Since the Court of Appeals affirmed the District Court's careful opinion granting summary judgment, Petitioners' argument that the Court of Appeals autho-

rized tribes to tax non-members regardless of the facts is pure hyperbole.

The record establishes both that Petitioners engage in commercial and consensual dealings with the Tribe and its members and that their exploitation of reservation timber resources and tourism trade affects the political integrity, economic security and welfare of the Tribe and its members. The tax thus can be justified under either of the alternative standards discussed in Montana.[13]

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[13] That the Court of Appeals did not endorse a "carte blanche" territorial approach to jurisdiction over non-Indians on fee land is evident from its discussion of Montana. Enlightening in this respect is the Court of Appeals citation of Swift Transportation Co. v. John, 546 F.Supp. 1185 (D. Ariz. 1982). The District Court there enjoined a civil action for damages in the Navajo Tribal Court growing out of a collision between a non-Indian owned truck and Navajo Indians. The truck was on a highway traversing the Navajo Reservation which the District Court equated with fee land.

The fact that land is fee patented is not an absolute bar to tribal jurisdiction, as Petitioners apparently believe. Fee lands remain a part of the Reservation. Confederated Salish & Kootenai Tribes v. Moe, 425 U.S. 463, 478-479 (1976); United States v. Mazurie, 419 U.S. 544, 553-556 (1974); Superintendent v. Seymour, 368 U.S. 351 (1962). All lands within an Indian reservation, including fee patented lands, are a part of "Indian country." 18 U.S.C. Section 1151. DeCoteau v. District Court, 420 U.S. 425, 427 n.2 (1975). The fact that land is fee patented is a factor that must be

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13/ (footnote continued from previous page) The truck was only temporarily passing through the Reservation. If the Court of Appeals was applying a pure territorial approach to tribal jurisdiction, as Petitioners contend, it is difficult to understand why the Court of Appeals relied upon Swift, which eschews a pure territorial approach.

considered in assessing relevant tribal interests, but it is to be considered together with other factors which shed light on whether, in a particular case, significant tribal interests justify the exercise of tribal jurisdiction. Here, Petitioners dealt with the Tribe and its members and took advantage of business opportunities created by the Tribe to promote reservation economic development. These matters directly implicate tribal interests of paramount importance. Many of these tribal programs are approved and financed under congressional enactments specifically intended to foster tribal economic and political self-sufficiency. White Mountain Apache v. Bracker, 448 U.S. 136, 143 n.10 (1980). Federal funding of these programs are not intended as permanent operating subsidies, but as seed money to help tribes initiate

programs that will sustain themselves through reservation sources.[14] In Merrion, this Court agreed that "it simply does not make sense to expect tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers." 455 U.S. at 138 n.5. Since the Tribe promotes development of Reservations's tourism and forestry resources from which Petitioners derive business revenue, "there is nothing exceptional in requiring Petitioners to contribute through taxes to the general cost of tribal governments." Merrion v. Jicarilla Apache

[14] President Reagan established a Commission in January of 1983 to advise on how to promote Reservation economic development without promoting dependence on federal financial assistance. App. B to this Brief.

Tribe, 455 U.S. at 138. Petitioners' claim that there is absolutely no tribal jurisdiction to tax businesses operating on fee land which affect significant tribal interests was property rejected by the Court of Appeals.

D. No Conflict With Dry Creek Case

In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), this Court considered a challenge under the Indian Civil Rights Act (ICRA), 25 U.S.C. Sec. 1301, to the Pueblo's enrollment criteria by an unenrolled non-member. The Court reconfirmed the doctrine of tribal sovereign immunity. The Court also held that tribal fora were required to apply the remedial provisions of the ICRA but that Congress had not manifested an intent to create a federal cause of action for ICRA claims. The Court noted that "Tribal Courts have repeatedly been recognized as appro-

priate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." 435 U.S. at 66. Although Congress has the power to create a federal cause of action, 435 U.S. at 72, it has not acted to do so in the 5 1/2 years since Martinez was decided.

Despite Martinez, Petitioners assert there should be federal court review of their ICRA claim that a tribal tax credit to any business which employs Indians on the Reservation violates equal protection or due process of tribal laws. Petitioners rely on Dry Creek Lodge, Inc. Shoshone and Arapahoe Tribes, 623 F.2d 682 (10th Cir. 1980), which dealt with a unique problem. A dispute arose between non-Indian owners of the Lodge and the tribal government of the Wind River Reservation. Tribal

officials blockaded the road providing access to the Lodge so that persons at the Lodge could not get out. Therefore, the parties at the Lodge sought a forum in the tribal court. They were denied access to the tribal court by the tribal judge and tribal council. The Court of Appeals rejected the argument that there was no federal cause of action, since otherwise there would have been no forum available to the Dry Creek Plaintiffs. 623 F.2d at 685. The Tenth Circuit subsequently limited Dry Creek to its unique facts, stating "That case involved particularly egregious allegations of personal restraint and deprivation of personal rights that are not present in this action." Ramey Construction Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 319 n.4 (10th Cir. 1982. Accord, Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324,

1345-1346 (10th Cir. 1982). In Kenai Oil & Gas Co. v. Andrus, 522 F.Supp. 521, 530 (D. Utah 1981), the District Court read Dry Creek narrowly as meaning "that where no tribal remedy is available a plaintiff may have access to a federal forum." Assertion that resort to a tribal forum would be futile is not sufficient. The District Court said there must be an actual attempt at seeking a tribal remedy which shows that none exists. Id. at 530-531.[15]/

Petitioners in the present case never submitted any of their claims to any tribal administrative or judicial

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[15]/ Tenth Circuit and lower court decisions limiting Dry Creek to its unique facts are quite likely based on a realization that Dry Creek is "clearly wrong," F. Cohen, Handbook of Federal Indian Law, 668 n.52 (1982), because it squarely conflicts with this Court's holding in Martinez.

fora. The Quinault Tribal Court, which is an independent court under the Quinault Constitution, was available at all times with a panel of lay and lawyer judges capable of considering Petitioners' claims. Unlike Dry Creek, therefore, what kept Petitioners from submitting their claims to the Tribal Court was their own deliberate decision to bypass that remedy. Dry Creek is obviously distinguishable on its unique facts. There is no Circuit conflict that needs to be resolved.

E. Quinault Tax is Nondiscriminatory

Petitioners' claim that the Quinault tax is discriminatory because it offers a tax credit to any business which employs Indians on the Reservation. The tax credit is available to Petitioners any time they employ an Indian. The tax credit is consistent with 42 U.S.C. Section 2000e-2(i), the Targeted Jobs Tax Credit, 26 U.S.C. Sections 44B, 51,

and 53, and similar enactments. The tax credit is reasonable and lawful. Morton v. Mancari, 417 U.S. 535 (1974).

IV

No Fifth Amendment Delegation Problem

Tribal power to tax derives from the original sovereignty of Indian tribes. Washington v. Confederated Colville Tribes, 447 U.S. 134, 152-153 (1980). Since this power was not delegated to Tribes by Congress, Petitioners' Fifth Amendment delegation argument is insubstantial. Hagans v. Lavine, 415 U.S. 528 (1974). 16/

16/ Pursuant to the Quinault Treaty and the Commerce Clause, Congress has broad power to legislate in the field of tribal taxation. Santa Clara Pueblo v. Martinez, 436 U.S. at 56-57; Morris v. Hitchcock, 194 U.S. at 392; Buster v. Wright, 135 Fed. at 953-955. A case in point is the Indian Tribal Government Tax Status Act of 1982, P.L. 970473, Section 202(a), which affords a federal tax deduction under 26 U.S.C. Section 164 for business taxes paid to tribes. If particular tribal taxes are thought to be contrary to overriding federal interests, that determination is to be made by Congress, Commonwealth Edison Co. v. Montana, 435 U.S. at 628, where, of course, Petitioners are represented.

V

Conclusion

The Writ should be denied.

Respectfully submitted,

Michael P O'Connell by MC

Michael P. O'Connell
Reservation Attorney

November 26, 1979

Ralph. I. Thomas
Stewart & Thomas, Inc., P.S.
101 First Street South
Montesano, WA 98563

Re: Quinault Tax

Dear Ralph:

The case continues to remain in a pending status before the Honorable Judge Tanner of the United States District Court sitting in Tacoma, Washington. In the last month, I have spoken with the Judge's law clerk who informs me that the Quinault tax case is one of many which they hope to get to some time in the not to distance future. Apparently they are facing a rather substantial case load and, even though this case is ready for decision on cross-motions (my motion for summary judgment and the tribe's motion to dismiss), the court simply has not had time to get to it.

As a consequence, I certainly wouldn't pay the tribal tax to appear before the tribal court if I were you.

I will keep you advised of developments.

Very truly yours,

KARGIANIS & AUSTIN

/s/
Ronald P. Erickson

RPE/ck

Federal Register

Vol. 48 No. 12

Tuesday, January 18, 1983

Title 3-

The President

Presidential Documents

Executive Order 12401 of

January 14, 1983

Presidential Commission on Indian Reservation Economies

By the authority vested in me as President of the United States of America, and in order to establish in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App. I), an advisory commission to promote the development of a strong private sector on Federally recognized Indian reservations, it is hereby ordered as follows:

Section 1. Establishment (a) There is established a Presidential Commission on Indian Reservation Economies.

(b) The Commission shall be composed of no more than nine members, who shall be appointed by the President from among the private sector, reservation tribal

governments, economic academicians, and Federal employees.

(c) The President shall designate a non-Indian representative and an Indian representative to serve as cochairmen of the Commission.

Sec. 2. Functions (a) The Commission shall advise the President on what actions should be taken to develop a stronger private sector on Federally recognized Indian reservations, lessen tribal dependence on Federal monies and programs and reduce the Federal presence in Indian affairs. The underlying principles of this mission are the government-to-government relationship, the established Federal policy of self-determination and the Federal trust responsibility.

(b) The Commission will focus exclusively on the following items, and not on new Federal financial assistance:

(1) Defining the existing Federal legislative, regulatory, and procedural obstacles to the creation of positive economic environments on Indian Reservations.

(2) Identifying and recommending changes or other remedial actions necessary to remove these obstacles.

(3) Defining the obstacles at the State, local and tribal government levels which impede both Indian and non-Indian private sector investments on reservations.

(4) Identifying actions which these levels of government could take to

rectify the identified problems.

(5) Recommending ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies, including capital formation.

(c) The Commission should review studies undertaken in the last decade to obtain pertinent recommendations that are directly related to its mission.

(d) The Commission shall, unless sooner extended, submit a final report to the President and to the Secretary of the Interior within six months after appointment of the last Commissioner, or by September 30, 1983, whichever comes earlier.

Sec. 3 Administration (a) The heads of Executive agencies shall, to the extent permitted by law, provide the Commission with such information as may be necessary for the effective performance of its functions.

(b) Members of the Commission may receive compensation for their work on the Commission. While engaged in the work of the Commission members may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittenly in the government service (5 U.S.C. 5701-5707).

(c) The Secretary of the Interior shall, to the extent permitted by law and subject to the availability of funds, provide the Commission which such administrative services, funds, facili-

ties, staff and other support services as may be necessary for the effective performance of its functions.

(d) The Commission will meet approximately 15 times at the call of the chairmen. All meetings of the Commission and all agenda must have prior approval of the chairmen.

(e) In carrying out its responsibilities, the Commission is authorized to:

(1) Conduct hearings, interviews, and reviews at field sites, or wherever deemed necessary to fulfill its duties.

(2) Confer with Indian tribal government officials and members, private sector business officials and managers, and other parties dealing with matters pertaining to the Commission's mission.

Sec. 4 General Provisions (a) Notwithstanding the provisions of any other Executive order, the responsibilities of the President under the Federal Advisory Committee Act, as amended, except that of reporting annually to the Congress, which are applicable to the advisory commission established by this Order, shall be performed by the Secretary of the Interior, in accordance with the guidelines and procedure established by the Adminstrator of General Services.

(b) The Commission shall terminate 60 days after it transmits its final report to the President, or on December 31, 1983, whichever comes earlier.

THE WHITE HOUSE January 14, 1983

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 24, 1983

STATEMENT BY THE PRESIDENT

INDIAN POLICY

This Administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments, but also to federally recognized American Indian tribes.

When European colonial powers began to explore and colonize this land, they entered into treaties with sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this Administration pledges to uphold.

In 1970, President Nixon announced a national policy of self-determination for Indian tribes. At the heart of the new policy was a commitment by the federal government to foster and encourage tribal self-government. That commitment was signed into law in 1975 as the Indian Self-Determination and Education Assistance Act.

The principle of self-government set forth in this Act was a good starting point. However, since 1975, there has been more rhetoric than action. Instead of fostering and encouraging self-government, federal policies have by and large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decisionmaking, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.

This Administration intends to reverse this trend by removing the obstacles to self-government and by creating a more favorable environment for the development of healthy reservation economies. Tribal governments, the federal government, and the private sector will all have a role. This Administration will take a flexible approach which recognizes the diversity among tribes and the right of each tribe to set its own priorities and goals. Change will not happen overnight. Development will be chartered by the tribes, not the federal government.

This Administration honors the commitment this nation made in 1970 and 1975 to strengthen tribal governments and lessen federal control over tribal governmental affairs. This Administration is determined to turn these goals into reality. Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.

In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.

Tribal Self-Government

Tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the federal government and should, therefore, have the primary responsibility for meeting those needs. The only effective way for Indian reservations to develop is through tribal governments which are responsive and accountable to their members.

Early in this nation's dealings with Indian tribes, federal employees began to perform Indian tribal government functions. Despite the Indian Self-Determination Act, major tribal government functions -- enforcing, tribal laws, developing and managing tribal resources, providing health and

social services, educating children -- are frequently still carried on by federal employees. The federal government must move away from this surrogate role which undermines the concept of self-government.

It is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater precentage of the cost of their self-government. Some tribes are already moving in this direction. This Administration pledges to assist tribes in strengthening their governments by removing the federal impediments to tribal self-government and tribal resource development. Necessary federal funds will continue to be available. This Administration affirms the right of tribes to determine the best way to meet the eneeds of their members and to establish and run programs which best meet those needs.

For those small tribes which have the greatest need to develop core governmental capacitiies, this Administration has developed through the Assistant Secretary of the Interior for Indian Affairs, the Small Tribes Initiative. This program will provide financial support necessary to allow these tribes to develop basic tribal administrative and management capabilities.

In keeping with the government-to-government relationship, Indian tribes are defined by law as eligible entities and receive direct funding, if they wish, in five block grant programs administered by the Department of Health and Human Services. These and other

blocks to the states consolidated dozens of categorical federal domestic assistance programs to reduce fragmentation and overlap, eliminate excessive federal regulation, and provide for more local control. This Administration now proposes that Indian tribes be eligible for direct funding in the Title XX social services block, the block with the largest appropriation and the greatest flexibility in service delivery.

In addition, we are moving the White House liaison for federally-recognized tribes from the Office of Public Liaison to the Office of Intergovernmental Affairs, which maintains liaison with state and local governments. In the past several administrations, tribes have been placed along with vital interest groups, such as veterans, businessmen and religious leaders. In moving the tribal government contact within the White House Intergovernmental Affairs staff, this Administration is underscoring its commitment to recognizing tribal governments on a government-to-government basis.

Further, we are recommending that the Congress expand the authorized membership of the Advisory Commission on Intergovernmental Relations (42 U.S.C. 4273) to include a representative of Indian tribal governments. In the interim before Congressional action, we are requesting that the Assistant Secretary for Indian Affairs join the Commission as an observer. We also supported and signed into law the Indian tax laws as applies to other governments with essentially the same treatment

under federal tax laws as applies to other governments with regard to revenue raising and saving mechanisms.

In addition, this Administration calls upon Congress to replace House Concurrent Resolution 108 of the 83rd Congress, the resolution which established the now discredited policy of terminating the federal-tribal relationship. Congress has implicitly rejected the termination policy by enacting the Indian Self-Determination and Education Assistance Act of 1975. However, because the termination policy declared in H. Con. Res. 108 has not been expressly and formally repudiated by a concurrent resolution of Congress, it continues to create among the Indian people an apprehension that the United States may not in the future honor the unique relationship between the Indian people and the federal government. A lingering threat of termination has no place in this Administration's policy of self-government for Indian tribes, and I ask Congress to again express its support of self-government.

These actions are but the first step in restoring control to tribal governments. Much more needs to be done. Without sound reservation economies, the concept of self-government has little meaning. In the past, despite good intentions, the federal government has been one of the major obstacles to economic progress. This Administration intends to remove the impediments to economic development and to encourage cooperative efforts among the tribes, the federal government and the private sector in developing

reservation economies.

Development of Reservation Economies

The economies of American Indian reservations are extremely depressed with unemployment rates among the highest in the country. Indian leaders have told this Administration that the development of reservation economies is their number one priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services. Past attempts to stimulate growth have been fragmented and largely ineffective. As a result, involvement of private industry has been limited, with only infrequent success. Developing reservation economies offers a special challenge: devising investment procedures consistent with the trust status; removing legal barriers which restrict the type of contracts tribes can enter into and reducing the numerous and complex regulations which hinder economic growth.

Tribes have had limited opportunities to invest in their own economies because often there has been no established resource base for community investment and development. Many reservations lack a developed physical infrastructure including utilities, transportation and other public services. They also often lack the regulatory, adjudicatory and enforcement mechanisms necessary to interact with the private sector for reservation economic development. Development on the reservation offers potential for tribes and individual entrepreneurs, in manufacturing,

agribusiness and modern technology, as well as fishing, livestock, arts and crafts and other traditional livelihoods.

Natural resources such as timber, fishing and energy provide an avenue of development for many tribes. Tribal governments have the responsibility to determine the extent and the methods to developing the tribe's natural resources. The federal government's responsibility should not be used to hinder tribes from taking advantage of economic development opportunities.

With regard to energy resources, both the Indian tribes and the nation stand to gain from the prudent development and management of the vast coal, oil, gas, uranium and other resources found on Indian lands. As already demonstrated by a number of tribes, these resources can become the foundation for economic development on many reservations while lessening our nation's dependence on imported oil. The federal role is to encourage the production of energy resources in ways consistent with Indian values and priorities. To that end, we have strongly supported the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.

It is the free market which will supply the bulk of the capital investments required to develop tribal energy and other resources. A fundamental prerequisite to economic development is capital formation. The establishment of

a financial structure that is a part of the Indian reservation community is essential to the development of Indian capital formation.

Federal support will be made available to tribes to assist them in developing the necessary management capability and in attracting private capital. As a first step in that direction, we provided funds in the FY 1983 budget to provide seed money to tribes to attract private funding for economic development ventures on reservations. As more tribes develop their capital resource base and increase their managerial expertise, they will have an opportunity to realize the maximum return on their investments and will be able to share an increasing portion of the business risk.

It is the policy of this Administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. In some cases, tribes and the private sector have already taken innovative approaches which have overcome the legislative and regulatory impediments to economic progress.

Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed. This Administration, therefore, is establishing a Presidential Advisory Commission on Indian Reservation Economies. The Commission, composed of tribal and private sector leaders, is to identify obstacles to economic growth in the public and private sector at all

levels; examine and recommend changes in federal law, regulations and procedures to remove such obstacles; identify actions state, local and tribal governments could take to rectify identified problems; and recommend ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies. It is also to be charged with the responsibility for advising the President on recommended actions required to create a positive environment for the development and growth of reservation economies.

Numerous federal agencies can offer specialized assistance and expertise to the tribes not only in economic development, but also in housing, health, education, job training, and other areas which are an integral part of reservation economies. It is to the advantage of the tribes, and in the interest of the taxpayers, that the federal role be fully reviewed and coordinated. Therefore, this Administration directs the Cabinet Council on Human Resources to act as a mechanism to ensure that federal activities are non-duplicative, cost effective, and consistent with the goal of encouraging self-government with a minimum of federal interference.

Summary

This Administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs.

This Administration has sought suggestions from Indian leaders in forming the policies which we have announced. We intend to continue this dialogue with the tribes as these policies are implemented.

The governmental and economic reforms proposed for the benefit of Indian tribes and their members cannot be achieved in a vacuum.

This nation's economic health -- and that of the tribes -- depends on adopting this Administration's full Economic Recovery Program. This program calls for eliminating excessive federal spending and taxes, removing burdensome regulations, and establishing a sound monetary policy. A full economic recovery will unleash the potential strength of the private sector and ensure a vigorous economic climate for development which will benefit not only Indian people, but all other Americans as well.

Attachment

REAGAN ADMINISTRATION

INDIAN POLICY INITIATIVES

Request that Congress repudiate House Concurrent Resolution 108 of the 83rd Congress which called for termination of the federal-tribal relationship. The Administration wants this lingering threat of termination replaced by a resolution expressing its support of a government-to-government relationship.

Ask Congress to expand the authorized membership of the Advisory Commission on Intergovernmental Relations to include a representative of Indian tribal governments. In the interim, request that the Assistant Secretary of the Interior for Indian Affairs join the ACIR as an observer.

Move the White House liaison for federally-recognized tribes from the Office of Public Liaison to the Office of Intergovernmental Affairs.

Establish a Presidential Advisory Commission on Indian Reservation Economies to identify obstacles to economic growth and recommend changes at all levels; recommend ways to encourage private sector involvement, and advise the President what actions are needed to create a positive environment for the development and growth of reservation economies.

Support direct funding to Indian tribes under the Title XX social services block grant to states.

Sought and obtained funds for FY 1983 to implement the Small Tribes Initiative to provide financial support needed to allow small tribes to develop basic tribal administrative and management capabilities.

Sought and obtained funds for FY 1983 to provide seed money for tribes for economic development ventures on reservations.

Supported and signed into law the Tribal Governmental Tax Status Act which will provide tribal governments with the same revenue raising and saving mechanisms available to other governments.

Support the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.

Direct the Cabinet Council on Human Resources to act as a review and coordination mechanism to ensure that federal activities are non-duplicative, cost effective and consistent with the goal of encouraging tribal self-government with a minimum of federal interference.